

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Wipman
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FILE: B-209018

DATE: February 3, 1983

MATTER OF: Tom Shaw, Inc.

DIGEST:

1. When doubt exists as to when protester received knowledge of initial adverse agency action on protest initially filed with agency, doubt is resolved in favor of timeliness of the protest.
2. A telex modification of a bid, Government time/date stamped 3 minutes after the time set for receipt of bids, is properly rejected as late, notwithstanding Western Union evidence that modification may have been received timely and absence of evidence that the late receipt was due solely to mishandling by the Government in the process of receipt.

Tom Shaw, Inc. (Shaw), protests the Louisville District, Army Corps of Engineers, rejection of its bid modification as late under invitation for bids (IFB) DACW27-82-B-0052, for rehabilitation of a submergible gate sill.

We deny the protest.

Bids were opened as scheduled at 2 p.m. Louisville local time, eastern daylight time (EDT), on August 4, 1982, and the Shaw bid was the highest. At 2:07 p.m., EDT, the Army teletype operator delivered to the bid opening room a Western Union telex modification from Shaw which would make the bid of Shaw the low bid. However, because the telex modification was Government time/date stamped at 2:03 p.m., EDT, and the contracting officer found no backlog of incoming telegrams, it was determined that the bid modification should be rejected as late.

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Abhe & Svoboda (Svoboda), the low bidder if the Shaw modification is not considered, contends that the protest is untimely because Shaw was notified of the bid rejection on August 5, 1982, but did not protest to the Army until August 23, 1982, more than 10 days after the basis of protest was known. However, Shaw timely protested the August 5 rejection of its bid to the Army on August 16, 1982. This protest was denied by letter dated August 25, and the protest here was filed on September 10, 1982, 11 working days later. Our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1982), require that the protest be received in our Office within 10 days of notification of adverse agency action on a protest initially filed with the agency. The record does not indicate the date that Shaw received the August 25, 1982, notice of protest denial, the adverse agency action. Doubt concerning timeliness is resolved in favor of the protest being timely. Kentucky Building Maintenance, Inc., B-203206, October 9, 1981, 81-2 CPD 293. Therefore, we find the protest to be timely.

The protester, relying on Western Union records, alleges that the telex modification was received prior to bid opening. These records show that, after the telex was filed at one Western Union office at 1:33 p.m., EDT, final transmission from another Western Union office to the Government telex began at 1:57 p.m., EDT. Calculating the number of words in the telex (initially contended to be 238.20 words, then 225.8 words, and now 192 words) and the capacities of the telex machines involved, the protester argues that the transmission took no longer than 2.90 minutes, and the bid modification was received between 1:59 p.m., EDT, and 2:00 p.m., EDT. Therefore, the protester alleges that the time/date stamp showing receipt at 2:03 p.m., EDT, could only have resulted from Government mishandling, that is, if the Corps teletype machine was not operating properly, the time/date was inaccurate, or the Army teletype operator did not hand-stamp the telex promptly.

The Army contends that under the IFB's late bid clause and surrounding circumstances, the bid modification was

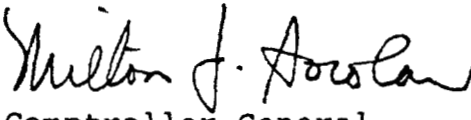
properly determined to have been received late. The Army points out that the IFB states that bidders modifying bids by teletype are responsible that the modification is dispatched in sufficient time to reach the destination prior to bid opening. Also, under the IFB's late bid clause prescribed by Defense Acquisition Regulation § 7-2002.2 (1976 ed.), a late modification can be considered only if the late receipt was due solely to mishandling by the Government after receipt at the Government installation. Since the clause provides that the only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of the installation, the Army argues the question of mishandling is irrelevant, and, notwithstanding this, there is no evidence of mishandling.

Nothing in the record shows conclusively that the modification was received by the bid opening time. The Western Union evidence shows only that final transmission of the modification to the Army began at 1:57 p.m., EDT. Considering the circumstances in a light most favorable to the protester, the modification, based on the number of words (192) and the sending capability of the Western Union machine (60 to 66 words per minute), the modification was received either just prior (1:59.9 p.m.) or just after (2:00.2 p.m.) bid opening.

In any event, the IFB's late bid clause and our decisions provide that the only acceptable evidence to establish the time of receipt of a modification at the Government installation is the agency time/date stamp. Evidence maintained by Western Union to prove the inaccuracy of the time/date stamp is unacceptable, even where Western Union evidence shows, unlike here, timely receipt. Cecile Industries, Inc., B-206796, July 7, 1982, 82-2 CPD 29; Keco Industries, Inc., B-204869, April 7, 1982, 82-1 CPD 324. Since the only acceptable evidence to establish time of receipt of the modification shows that the modification was not received until 3 minutes after bid opening, the contracting officer properly determined that the modification was late.

The protester's suggestion that any delay was caused by a defect in the Army telex or in the time/date stamping machine, or lack of diligence by the teletype operator, is apparently a contention that any late receipt was due solely to mishandling by the Government. However, in a late modification situation, the time of receipt at the Government installation prior to bid opening must be established before we can consider the question of mishandling. Here, as in Cecile Industries, Inc., supra, since receipt of the modification prior to bid opening cannot be established, the question of mishandling is irrelevant. Finally, we find no evidence of record that any Government mishandling occurred in the process of receipt, which was the paramount cause for the late receipt. See Keco Industries, Inc., supra; X-Tyal International Corp., B-202434, January 7, 1982, 82-1 CPD 19. Shaw's suggestion of such mishandling is speculative.

Protest denied.

for 
Comptroller General
of the United States